

No.

IN THE
Supreme Court of the United States

MICHAEL COWELS AND MICHAEL MIMS,
Petitioners,

v.

THE FEDERAL BUREAU OF INVESTIGATION,
CHRISTOPHER WRAY, AND PAULA WULFF,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

ELLIOT M. WEINSTEIN
83 ATLANTIC AVENUE
BOSTON, MA, 02110
(617) 367-9334
elliot@eweinsteinlaw.com

DAVID J. APFEL
Counsel of Record
DYLAN SCHWEERS
GABRIEL I. ROSSMAN
GOODWIN PROCTER LLP
100 NORTHERN AVENUE
BOSTON, MA 02210
(617) 570-1000
dapfel@goodwinlaw.com

December 20, 2019

EZEKIEL L. HILL
GOODWIN PROCTER LLP
1900 N. STREET NW
WASHINGTON, DC 20036

Counsel for Petitioners

QUESTIONS PRESENTED

The questions presented are as follows:

1. Whether a determination by the Federal Bureau of Investigation (the “FBI”) that a DNA profile is ineligible for upload to the National DNA Index System (“NDIS”) – the nationwide database of DNA profiles – is arbitrary and capricious and must be set aside pursuant to the Administrative Procedure Act where the determination fails to consider the source of the DNA profile.
2. Whether a determination by the FBI that a DNA profile is ineligible for upload to NDIS must be remanded as pretextual where the determination is not based on the FBI’s independent review of relevant information but rather is based on limited information provided by an entity seeking a determination of ineligible.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
INTRODUCTION	2
STATEMENT	6
A. Petitioners Were Convicted Of The 1993 Murder Of Ms. Miscioscia.	6
B. The SJC Vacated Petitioners' Convictions After DNA Testing Demonstrated That The Key Physical Evidence Upon Which The Commonwealth Relied At Trial Was Not Linked To Petitioners Or Ms. Miscioscia. ..	6
C. DNA Testing Of Seminal Fluid From Inside A Used Condom Found Next To Ms. Miscioscia's Body Obtained An Unknown Male DNA Profile.	7

D. The State Trial Court Ordered The Commonwealth To Upload The Profile To CODIS.....	8
E. The FBI Determined That The Profile Was Ineligible For Upload To NDIS.....	9
F. Proceedings Below.....	11
REASONS FOR GRANTING THE WRIT	13
I. The Decision Below Is Contrary To This Court's Precedent.....	13
A. The First Circuit's Decision Is Contrary To This Court's Precedent Regarding Arbitrary And Capricious Agency Determinations.....	13
B. The First Circuit's Decision is Contrary to This Court's Precedent Regarding Agency Determinations Resting On A Pretextual Basis.	15
II. This Case Is An Appropriate Vehicle To Address The Important Questions Presented.....	18
CONCLUSION	20
APPENDIX A: Court of Appeals Decision	1a
APPENDIX B: District Court Decision.....	15a

APPENDIX C: FBI Ineligibility Determination..30a

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Dep’t of Commerce v. New York</i> , 139 S. Ct. 2551 (2019)	5, 16, 17, 18
<i>Judulang v. Holder</i> , 565 U.S. 42 (2011)	13, 15
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983)	4, 13, 14, 15
Statutes	
5 U.S.C. § 706(2)(A)	13
28 U.S.C. § 1254(1)	1
34 U.S.C. § 12591 <i>et seq.</i>	11
34 U.S.C. § 12592(b)(3)(c)	18
Other Authorities	
146 Cong. Rec. H8572–01 (daily ed. Oct. 2, 2000) (statement of Rep. Canady)	18
FBI, <i>CODIS-NDIS Statistics</i> , https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics (last accessed December 20, 2019).....	8

PETITION FOR A WRIT OF CERTIORARI

Petitioners Michael Cowels and Michael Mims respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-14a, is reported at 936 F.3d 62. The opinion of the district court, Pet. App. 15a-29a, is reported at 327 F. Supp. 3d 242.

JURISDICTION

The court of appeals entered its judgment on August 26, 2019. On November 8, 2019, Justice Breyer extended the time for filing this petition to and including December 20, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 706(2)(A) of the Administrative Procedure Act (5 U.S.C. § 706(2)(A)) provides:

The reviewing court shall--

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law

INTRODUCTION

Petitioners spent more than 20 years behind bars for the 1993 murder of Belinda Miscioscia. Post-conviction DNA testing on the key piece of physical evidence that the Commonwealth of Massachusetts used to secure their convictions, however, demonstrated that the evidence was actually exculpatory, as the blood on the evidence was not that of Petitioners or Ms. Miscioscia. Based on the results of that DNA testing, in 2015 the Massachusetts Supreme Judicial Court (the “SJC”) vacated Petitioners’ convictions and remanded for a new trial.

In preparing for the new trial, the Commonwealth, on its own initiative, performed DNA testing on additional physical evidence, including on swabs of seminal fluid (the “Swabs”) from *inside* a condom that was found next to Ms. Miscioscia’s body at the crime scene (the “Condom”). The DNA testing of the Swabs obtained the DNA profile of an unknown male (the “Profile”) that does not match either Petitioner.

Believing that the Profile could be that of the perpetrator of Ms. Miscioscia’s murder, Petitioners sought to have it uploaded to the Combined DNA Index System (“CODIS”) for comparison purposes. CODIS is a DNA profile database that operates at the local, state, and national levels. Participating states, such as the Commonwealth, administer the state level of CODIS, known as the State DNA Index System (“SDIS”). The Federal Bureau of Investigation (the “FBI”) administers the national level of CODIS, known as the National DNA Index System

(“NDIS”), which contains vastly more DNA profiles than any of the state-level databases

The Commonwealth initially refused Petitioners’ request to upload the Profile to CODIS. Over the Commonwealth’s objections, however, a state court ordered the Commonwealth to upload the Profile to CODIS and the Commonwealth did so but no match was found. The Commonwealth then refused to request that the FBI accept the Profile for upload to NDIS but eventually agreed to do so in light of the state court order.

In making the request, however, the Commonwealth failed to provide the FBI with critical relevant material regarding the Profile. Instead, the Commonwealth biased the FBI’s response to the request by providing limited material that did not include documentary evidence indicating that the Profile was obtained from DNA testing of swabs taken of seminal fluid *inside* the Condom. And in making the request, the Commonwealth asserted that the Profile was ineligible for upload to NDIS.

The FBI in turn concluded that the Profile was ineligible for upload to NDIS. The FBI’s written explanation for the ineligibility determination reveals the FBI’s flawed understanding of the record before it. The FBI reasoned that “[t]here is no indication in the material[s] provided that the condom was forensically connected to the victim (no alleles, partial or full profile[,] reported as would be expected had the condom come in contact with the victim.)” Pet. App. 30a. The FBI concluded that “it does not appear that there is a forensic nexus between Ms. Belinda Misci-

oscia and the condom to establish a putative perpetrator for the crime,” which is an eligibility requirement for the Profile to be uploaded to NDIS pursuant to the FBI’s National DNA Index System (NDIS) Operational Procedures Manual (the “NDIS Manual”). *Id.* at 31a. But, of course, DNA testing of the Swabs could not have revealed whether the Condom came into contact with Ms. Miscioscia or otherwise revealed a nexus to her because the Swabs were of seminal fluid found *inside* of the Condom. The FBI simply misunderstood the source of the Profile that it was being asked to upload. It mistakenly believed that the outside of the Condom, which has never been tested for DNA, was the source. Because it reflects a fundamental misunderstanding of the record, the FBI’s ineligibility determination was arbitrary and capricious and should be set aside pursuant to the Administrative Procedure Act (the “APA”). *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). The First Circuit failed to do so.

The FBI’s ineligibility determination was also pretextual. It was not based on the FBI’s independent review of relevant information but was instead based on limited materials provided by the Commonwealth, which sought a determination of ineligible. Importantly, the materials that the Commonwealth provided to the FBI did not include documentary evidence indicating that the Profile was obtained from DNA testing of swabs taken of seminal fluid *inside* the Condom. Furthermore, the Commonwealth did not inform the FBI that the Commonwealth had viewed the Condom as evidence connected to Ms.

Miscioscia's murder from the time it was collected at the crime scene in 1993 until DNA testing in 2015 confirmed that the Condom was not linked to Petitioners. Rather than conduct its own independent investigation, the FBI accepted the truncated and biased record that the Commonwealth provided at face value and reached the conclusion urged by the Commonwealth. The FBI's ineligibility determination, which did not disclose the FBI's blind acceptance of a contrived and incomplete record designed to reach a predetermined outcome, was pretextual and should therefore be remanded to the FBI. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). The First Circuit failed to do so.

The questions presented by this petition matter not only to Petitioners but to all current and future criminal defendants in whose cases an unknown DNA profile is obtained. NDIS, which was created to serve both law enforcement and criminal defendants, is the most powerful tool available for matching an unknown DNA profile to a known individual. In determining what profiles are eligible for upload to NDIS, the FBI is also determining which criminal defendants will benefit from this tool. Ensuring that the FBI applies the standards set by the NDIS Manual in a manner that is not arbitrary and capricious, and that the FBI explains its determinations in a manner that is not pretextual, is essential for NDIS to serve its intended purposes. Absent meaningful judicial review, the FBI's discretion in making such determinations will go unchecked.

STATEMENT

A. Petitioners Were Convicted Of The 1993 Murder Of Ms. Miscioscia.

In 1993, Ms. Miscioscia's body was found behind a woodworking shop in Chelsea, Massachusetts. Pet. App. 4a. In 1994, Petitioners were tried and convicted for her murder and sentenced to life imprisonment. *Id.* at 5a. Petitioners have steadfastly maintained their innocence.

B. The SJC Vacated Petitioners' Convictions After DNA Testing Demonstrated That The Key Physical Evidence Upon Which The Commonwealth Relied At Trial Was Not Linked To Petitioners Or Ms. Miscioscia.

In February 2015, the SJC vacated Petitioners' convictions and remanded their cases for a new trial. Pet. App. 5a. Post-conviction DNA testing had proven that blood found on a towel that Petitioners supposedly used to clean up after the murder – the key physical evidence the Commonwealth presented at trial – did not come from Petitioners or Ms. Miscioscia. *Id.* By the time the SJC vacated their convictions, Petitioners had each spent more than twenty years behind bars.

C. DNA Testing Of Seminal Fluid From Inside A Used Condom Found Next To Ms. Miscioscia's Body Obtained An Unknown Male DNA Profile.

At the 1993 crime scene, the Massachusetts State Police found the Condom next to Ms. Miscioscia's body. Pet. App. 4a-5a. The State Police collected and retained the Condom as evidence, tested it for hair and fiber, and took swabs of the *inside* of the Condom to test for the presence of seminal fluid, which was detected. *Id.* The State Police did not at that time conduct DNA testing (which was then in its infancy) of the Condom or the Swabs. *Id.* at 5a.

After the SJC vacated Petitioners' 1994 convictions, the Commonwealth began preparations for Petitioners' retrial. These preparations included performing DNA testing on additional physical evidence, including the Swabs. Pet. App. 5a. The Commonwealth apparently believed that DNA testing of the Swabs—which contained seminal fluid taken from *inside* the Condom found next to Ms. Miscioscia's body—would potentially obtain a DNA profile that matched Mr. Cowels or Mr. Mims. Just as the Commonwealth regarded the Condom as containing potentially inculpatory perpetrator evidence when it was collected in 1993, the Commonwealth continued to regard the Condom as containing potentially inculpatory perpetrator evidence when it submitted the Swabs for DNA testing 22 years later.

The Commonwealth's DNA testing of the Swabs obtained the Profile. Pet. App. 5a. The Profile does not match the DNA profile of either Petitioner. *Id.*

D. The State Trial Court Ordered The Commonwealth To Upload The Profile To CODIS.

CODIS is a software system and DNA profile database that operates at the local, state, and national levels. CODIS can be used to compare—and match—unidentified DNA profiles, including those obtained from crime scene evidence, with DNA profiles of known individuals. Pet. App. 3a. The Massachusetts state-level database (SDIS) contains about 150,000 DNA profiles, while the national-level database (NDIS) contains more than 18 million.¹

After Petitioners learned that the Commonwealth had obtained the Profile, they requested that the Commonwealth upload it to CODIS to permit comparison to DNA profiles of known individuals. Petitioners, who have always maintained their innocence, believe that the Profile may match the true perpetrator of Ms. Miscioscia's murder.

The Commonwealth refused Petitioners' request. But the state trial court, concerned about Petitioners being denied access to potentially exculpatory evidence, ordered the Commonwealth to upload the Profile to CODIS. Pet. App. 6a. The Commonwealth up-

¹ See FBI, *CODIS-NDIS Statistics*, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics> (last accessed December 20, 2019).

loaded the Profile to the Massachusetts SDIS but no match was found.

E. The FBI Determined That The Profile Was Ineligible For Upload To NDIS.

The Commonwealth then refused to request that the FBI upload the Profile to NDIS but eventually agreed to do so in light of the state court order. When the Commonwealth eventually made its reluctant request, it informed the FBI that it nonetheless viewed the Profile as “ineligible for SDIS and NDIS.” C.A. J.A. 208.

According to the FBI’s written ineligibility determination, in connection with the request, the Commonwealth provided the FBI with four documents relating to the Profile. Noticeably, and erroneously, absent from the documents provided was: (1) any documentary evidence indicating that the source of the Profile was swabs of seminal fluid found *inside* the Condom; and (2) any mention of the fact that Commonwealth had viewed the Condom as evidence connected to Ms. Miscioscia’s murder from the time it was collected at the crime scene in 1993 until DNA testing in 2015 revealed that the Condom was not linked to Petitioners. Such omissions indicate that the production was biased and tilted toward obtaining a predetermined result.

Beyond these material omissions, what the Commonwealth provided to the FBI was flawed. For example, the provided affidavit of a State Police crime laboratory technician opined that because Ms. Miscioscia’s DNA was not found “on” the Condom, the

Condom was insufficiently linked to Ms. Miscioscia's murder to support the upload of the Profile to CODIS. C.A. J.A. 200-201. The technician apparently did not understand that the outside of the Condom had not been tested for DNA and that the relevant DNA testing was limited to the testing of the Swabs.

Based on the limited, clearly erroneous, and biased information provided by the Commonwealth, the FBI determined that the Profile was ineligible for upload to NDIS pursuant to the NDIS Manual, which provides in relevant part that an unknown DNA profile must be "attributable to a putative perpetrator," or, in other words, sufficiently connected to the crime. Pet. App. 30a-32a. In its written ineligibility determination, the FBI stated that "for a DNA profile to be eligible for upload [to NDIS] . . . it must originate from and/or be associated with a crime scene and be attributable to a putative perpetrator." *Id.* at 31a. The FBI determined that "nothing forensically demonstrates a link between the victim and the subject condom to consider the obtained profile as coming from a putative perpetrator." *Id.* The FBI also observed that State Police notes from 1993 stated that the Condom had been found "covered with sawdust, dirt, dried vegetation etc. breaking apart."² *Id.* (emphasis omitted). The FBI concluded that "[t]here

² It is unsurprising that the Condom was discovered in this condition, as both it and Ms. Miscioscia's body were found outdoors on a loading dock behind a woodworking shop. Pet. App. 4a.

is no indication . . . that the condom was forensically connected to the victim (no alleles, partial or full profile[,] reported as would be expected had the condom come in contact with the victim).” *Id.* at 30a.

The FBI’s ineligibility determination did not acknowledge or address the facts that: (1) the Profile was obtained from DNA testing not of the Condom itself but of swabs taken of seminal fluid *inside* the Condom; and (2) the outside of the Condom has never been tested for DNA. Moreover, it is also clear that the FBI failed to investigate, or even ask about, the Commonwealth’s limited production of materials or its erroneous understanding of the record.

F. Proceedings Below.

1. On March 26, 2018, Petitioners filed a complaint for declaratory and injunctive relief in the district court. Petitioners alleged, among other things, that the FBI’s ineligibility determination was arbitrary and capricious, and therefore should be set aside pursuant to the APA.

2. On August 7, 2018, the district court granted Respondents’ motion to dismiss. Pet. App. 15a-29a. The district court concluded that Petitioners lacked standing to bring their APA claim because the relevant portions of the DNA Identification Act of 1994 (the “DNA Act”), 34 U.S.C. § 12591 *et seq.*, pursuant to which CODIS was established, “exude[] deference to the FBI” and “foreclose[] the application of any meaningful judicial standard of review” of the FBI’s ineligibility determination. *Id.* at 23a (internal quotation marks and alteration omitted).

3. On appeal, the First Circuit assumed that the FBI's ineligibility decision was subject to judicial review. Pet. App. 10a. The First Circuit observed that “[a]n agency action is arbitrary and capricious if the agency ‘relied on improper factors, failed to consider pertinent aspects of the problem, [or] offered a rationale contradicting the evidence before it’” *Id.* at 10a-11a (quoting *Bos. Redevelopment Auth. v. Nat'l Park Serv.*, 838 F.3d 42, 47 (1st Cir. 2016)). And the First Circuit acknowledged that “[s]ome of the language in the FBI's written explanation of its eligibility determination . . . suggest[s] that the [FBI] was not fully attuned to the distinction between the DNA testing of the swab from the inside of the condom and testing of the outside of the condom, which was never performed.” *Id.* at 13a (emphasis added).

But despite acknowledging the FBI's clearly erroneous understanding of the facts before it, the First Circuit held that the FBI's ineligibility determination was not arbitrary and capricious. Pet. App. 10a-14a. The First Circuit concluded that “the FBI's entire explanation makes reasonably clear that the agency's focus was on the absence of any DNA connection in the record between the condom and the victim . . . rather than on a misguided understanding that testing had definitively established that the condom had never come into contact with the victim.” *Id.* at 13a-14a. Of course, the “absence of any DNA connection . . . between the condom and the victim” is best explained by the fact that the Condom has never been tested for Ms. Miscioscia's DNA.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is Contrary To This Court's Precedent.

A. The First Circuit's Decision Is Contrary To This Court's Precedent Regarding Arbitrary And Capricious Agency Determinations.

The First Circuit allowed the FBI's ineligibility determination to stand even though the First Circuit recognized that the determination reflected a fundamental misunderstanding of the record before the FBI. The First Circuit's decision is thus contrary to this Court's precedent.

1. Under the APA, a reviewing court must declare unlawful, and set aside, agency action that is arbitrary and capricious. 5 U.S.C. § 706(2)(A). Judicial review of agency decision-making under the APA's arbitrary and capricious standard is "narrow." *State Farm*, 463 U.S. at 43. "But courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

"When reviewing an agency action, [a court] must assess, among other matters, 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Judulang*, 565 U.S. at 53 (quoting *State Farm*, 463 U.S. at 43). "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection

between the facts found and the choice made.” *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Under this standard, agency action is arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem” or “offered an explanation for its decision that runs counter to the evidence before the agency” *Id.* Further, courts “may not supply a reasoned basis for the agency’s action that the agency itself has not given.” *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

Under these well-established principles, the FBI’s ineligibility determination is arbitrary and capricious. The FBI determined that the Profile is ineligible for upload to NDIS because of the lack of a “forensic nexus between Ms. Belinda Miscioscia and the condom to establish a putative perpetrator for the crime.” Pet. App. 31a. The FBI based this finding on the absence of Ms. Miscioscia’s DNA on the Condom, “as would be expected had the condom come in contact with the victim.” *Id.* at 30a. But the Profile came from DNA testing of the Swabs of seminal fluid found *inside* the Condom. The outside of the Condom *has not* been tested for DNA. In other words, the FBI’s ineligibility determination was based on a fundamental misunderstanding of the DNA testing performed in connection with the Condom.

The FBI’s misunderstanding was, in part, the result of the FBI’s failure to conduct its own investigation. For instance, the FBI never considered the trial testimony of the forensic scientist who collected the Condom from the crime scene and created the Swabs

from which the Profile was obtained. *See* C.A. J.A. 260-262.

By basing its ineligibility determination on a fundamentally flawed understanding of the evidence before it, the FBI failed to consider “the relevant factors.” *See Judulang*, 565 U.S. at 53 (quoting *State Farm*, 463 U.S. at 43). By failing to examine the trial testimony of the forensic scientist who created the Swabs from which the Profile was obtained, the FBI failed to “examine the relevant data.” *See State Farm*, 463 U.S. at 43. And by incorrectly assuming that the DNA testing that had been performed would have revealed any forensic connection between Ms. Miscioscia and the Condom, the FBI “entirely failed to consider an important aspect of the problem.” *See id.* The FBI’s ineligibility determination was, therefore, arbitrary and capricious, and must be set aside. *See, e.g., Judulang*, 565 U.S. at 53 (agency decision arbitrary and capricious when agency relied on “irrelevant” factor); *State Farm*, 463 U.S. at 46-51 (agency decision arbitrary and capricious when agency “gave no consideration” to important aspects of the problem and “dismiss[ed]” crucial evidence in the administrative record).

B. The First Circuit’s Decision is Contrary to This Court’s Precedent Regarding Agency Determinations Resting On A Pretextual Basis.

Independent of its erroneous *de novo* finding that the FBI’s ineligibility determination was not arbitrary and capricious, the First Circuit also erred by disregarding the pretextual nature of the FBI’s de-

termination. The First Circuit’s decision is thus contrary to this Court’s decision in *Department of Commerce*, which held that an agency determination that rests on a pretextual basis cannot survive judicial review.

In *Department of Commerce*, the Secretary of Commerce had stated publicly that he had decided to add the citizenship question to the 2020 census “at the request of the Department of Justice” (“DOJ”), which allegedly sought improved citizenship data “for purposes of enforcing the Voting Rights Act” (“VRA”). 139 S. Ct. at 2562. But the record told a different story. In reality, it was the Secretary who had reached out to DOJ. *Id.* at 2564. And the Secretary convinced DOJ to formally request that the Department of Commerce add the citizenship question. *Id.*

Even though it concluded that the Secretary’s decision was not arbitrary or capricious, this Court invalidated the Secretary’s decision as resting on a pretextual basis. The Secretary’s decision to add the citizenship question could not “be adequately explained in terms of DOJ’s request for improved citizenship data to better enforce the VRA.” *Dep’t of Commerce*, 139 S. Ct. at 2575. And the record “reveal[ed] a significant mismatch between the decision the Secretary made and the rationale he provided.” *Id.* This Court refused to accept the Secretary’s pretextual justification for adding the citizenship question, explaining that “[t]he reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by

courts and the interested public.” *Id.* at 2575-76. And as this Court observed, “[a]ccepting contrived reasons would defeat the purpose of the enterprise.” *Id.* at 2576.

The FBI’s ineligibility determination is similarly pretextual and cannot survive judicial review. *See generally, Dep’t of Commerce*, 139 S. Ct. at 2573-76. It is pretextual because the record before the FBI was artificially limited to documents provided by a single interested party and the FBI did not otherwise undertake its own independent investigation. The FBI’s ineligibility determination was nothing other than a pretextual endorsement of the outcome urged and effectively contrived and dictated by the Commonwealth.

The Commonwealth provided the FBI with all of the documents that the FBI reviewed in connection with its ineligibility determination. Those documents failed to include documentary evidence indicating that (1) the Profile had been obtained from DNA testing of the Swabs taken of seminal fluid *inside* the Condom; and (2) the outside of the Condom has never been tested for DNA. In fact, the documents that were provided misleadingly suggested that DNA testing had been conducted on the outside of the Condom.

Taking the cues that accompanied the Commonwealth’s court-compelled request, the FBI failed to conduct its own investigation and instead merely reviewed the incomplete set of documents provided by the Commonwealth. The FBI’s ineligibility determination did not disclose the control that the Com-

monwealth exerted over the FBI's decision-making (which became known to Petitioners only in light of discovery in their ongoing criminal case). For example, the FBI's ineligibility determination did not disclose the fact that the Commonwealth had told the FBI that it believed that the Profile was ineligible for NDIS.

There is “a significant mismatch” between the realities of the FBI's ineligibility determination and the written explanation the FBI provided. *See Dep't of Commerce*, 139 S. Ct. at 2575. Because the FBI's ineligibility determination was contrived and pretextual, it cannot stand.

II. This Case Is An Appropriate Vehicle To Address The Important Questions Presented.

CODIS is intended to serve the search for the truth, not just the narrow interests of law enforcement. *See, e.g.*, 146 Cong. Rec. H8572–01, H8575–H8576 (daily ed. Oct. 2, 2000) (statement of Rep. Canady) (“The purpose of [CODIS] is to match DNA samples from crime scenes where there are no suspects with the DNA of convicted offenders. Clearly, the more samples we have in the system, the greater the likelihood we will come up with matches and solve cases.”). That is why the DNA Act specifically provides that “for criminal defense purposes . . . a defendant . . . shall have access to [NDIS] samples and analyses performed in connection with the case in which such defendant is charged.” 34 U.S.C. § 12592(b)(3)(c).

Robust judicial review of an FBI determination that a DNA profile is ineligible for upload to NDIS is critical to ensuring that CODIS continues to serve its intended purposes. The questions presented by this petition matter not only to Petitioners but to all current and future criminal defendants in whose cases an unknown DNA profile is obtained.

The risks associated with arbitrary and capricious and pretextual agency determinations are highlighted in this case. Here, the Commonwealth viewed the Condom as relevant evidence for more than 20 years but suddenly did an about-face as soon as DNA testing showed that the Condom was not inculpatory as to the Petitioners. The Commonwealth's change in position effectively resulted in the FBI refusing to permit the Profile to be uploaded to NDIS. The result is that Petitioners will face retrial for Ms. Miscioscia's murder without knowing the identity of the man whose seminal fluid was in a condom found next to her body.

Ensuring that the FBI applies the standards set by the NDIS Manual in a manner that is not arbitrary and capricious, and that the FBI explains its determinations in a manner that is not pretextual, is necessary for NDIS to serve its intended purposes, including providing criminal defendants with access to critical information. Absent meaningful judicial review of ineligibility determinations, the FBI's discretion in making such determinations will go unchecked.

This case also provides an ideal vehicle through which to address the questions presented because it

presents pure legal issues as to which no further factual development is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELLIOT M. WEINSTEIN
83 ATLANTIC AVENUE
BOSTON, MA, 02110
(617) 367-9334
elliot@eweinsteinlaw.com

DAVID J. APFEL
Counsel of Record
DYLAN SCHWEERS
GABRIEL I. ROSSMAN
GOODWIN PROCTER LLP
100 NORTHERN AVENUE
BOSTON, MA 02210
(617) 570-1000
dapfel@goodwinlaw.com

EZEKIEL L. HILL
GOODWIN PROCTER LLP
1900 N. STREET NW
WASHINGTON, DC 20036

December 20, 2019

Counsel for Petitioners